

REMARKS/ARGUMENTS

The rejections presented in the Office Action dated June 29, 2007 (hereinafter Office Action) have been considered. Claims 1-104 remain pending in the application. Reconsideration of the pending claims and allowance of the application in view of the present response is respectfully requested.

Regarding the requirement for restriction issued by the Examiner, the Examiner states that Applicant's traversal was on the grounds that "the designated species are not distinct and that there is no burden on the Examiner." The Examiner's characterization of the reasons for Applicant's traversal of the restriction requirement is not accurate. Applicant's arguments were not directed to the issue of the patentably distinctiveness or indistinctiveness of the species. The Applicant traversed the restriction because the species are not mutually exclusive and some of the species are disclosed as overlapping, e.g., a patient-reported condition may be also be an environmental condition, clearly making these non-mutually exclusive embodiments. Further, the Applicant argued that the Examiner had not met the evidentiary burden to support restriction by showing why there would be a serious burden on the Examiner under MPEP § 808.01(a).

Applicant acknowledges that the Examiner has made the restriction requirement final. The withdrawn claims 5,7-13, 15-19, 46-49, 51, 63, 64, 73, and 75-80 have been canceled for prosecution in one or more divisional applications.

Claims 31, 32, 36, 37, 50, 54, 55, 65, 67, 85, 86, 88, 89 and 91-94 are objected to as being dependent upon a rejected base claim, but would be allowable if rewritten in independent form. Applicant thanks the Examiner for the indication that the subject matter of claims 31, 32, 36, 37, 50, 54, 55, 65, 67, 85, 86, 88, 89 and 91-94 is allowable.

Claims 1-4, 6, 14, 20-45, 50, 52-62, 65-72, 74 and 81-104 are provisionally rejected based on 35 U.S.C. §101 as claiming the same invention as that of claims 1-40 and 80-100 of copending application no. 10/643,154.

Applicant respectfully submits that this rejection is in error. Statutory double patenting under 35 U.S.C. §101 is only appropriate when the claims of an application are substantially the same as those of a first patent. MPEP § 804. Claims 1-40 of U.S. Patent

Application S/N 10/643,154 (hereinafter '154) each include the limitation of delivering cardiac electrical stimulation therapy to mitigate predicted disordered breathing. Claims 80-100 of '154 include the limitation of a therapy delivery system. None of claims 1-4, 6, 14, 20-45, 50, 52-62, 65-72, 74 and 81-104 of the present application include any limitations directed to electrical stimulation therapy or to delivery systems configured to deliver therapy. Therefore, claims 1-4, 6, 14, 20-45, 50, 52-62, 65-72, 74 and 81-104 are not substantially the same as claims 1-40 or 80-100 of the '154 application. The provisional double patenting rejection based on 35 U.S.C. §101 is in error and must be withdrawn.

Claims 1-4, 6, 14, 25, 35, 38-45, 49, 68, 69, 71, 72, 74, 81, 82, 90, 95 and 97 are rejected based on 35 U.S.C. §102(e) as being anticipated by U.S. Publication No. 2004/0133079 by Mazar (hereinafter "Mazar"). Claims 1-4, 6, 14, 20-22, 26, 28, 35, 38, 41-45 and 49 are rejected based on 35 U.S.C. §102(b) as being anticipated by U.S. Patent No. 6,415,183 to Scheiner (hereinafter "Scheiner"). Claims 1, 23, 24, 26-30, 68, 70, 83, 84, 87 and 98-100 are rejected based 35 U.S.C. §102(e) as being anticipated by Mazar. Claim 61 is rejected based on 35 U.S.C. §103(a) as being unpatentable over Mazar in view of U.S. Patent No. 4,702,253 to Nappholz (hereinafter "Nappholz").

To expedite allowance of the application, Applicant has chosen to amend the claims to include subject matter indicated by the Examiner as allowable. Applicant does not acquiesce to the Examiner's rejections, or to the Examiner's characterizations with regard to Applicant's claims or to the asserted references.

The subject matter from allowable claim 36 has been incorporated into independent claims 1, 68, and 98, and claim 36 has been canceled; the subject matter from allowable claim 37 has been incorporated into independent claims 41 and 101; the subject matter of allowable claim 65 has been incorporated into independent claims 56 and 102 and claim 65 has been canceled.

All claims are now in condition for allowance. Authorization is given to charge Deposit Account No. 50-3581 (GUID.088PA) any necessary fees for this filing. If the Examiner believes it necessary or helpful, the Examiner is invited to contact the undersigned attorney to discuss any issues related to this case.

Respectfully submitted,

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Date: September 28, 2007

By:

A handwritten signature in black ink, appearing to read 'Clara Davis', written over a horizontal line.

Clara Davis
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